Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

OTIS W. PLASSMAN,
JOYCE A. PLASSMAN,

Petitioner,

vs.

CITY OF WAUSEON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED FOR REVIEW

1. In an action by building owners to stop the City, and its officers and employees from demolishing their commercial building, which previously was was found in a State Action to constitute a nuisance because of some structural defects which could be readily repaired, and because the commercial building was used for a recycling, or as a "junk" business as the City claimed, which is classified under the Code as industrial, is this District Court bound, <u>firstly,</u> to hold a Hearing, when the Plaintiffs' Affidavit state the building can be repaired safely by the Plaintiffs, and the Plaintiffs Attorney attaches to his Affidavit, a letter received on the day of filing from the City's Law Director, stating the City is willing for the owner to save the building, if the owner agrees to come up

with a "Plan" certified by an Architect or Engineer to bring the building into Compliance with the State and City Building Codes, and also the Mayor, some 40 days before, had issued a public statement published in this City's newspaper, that the City would give the building owner 90 days to come up with a "Plan", as mentioned above; and particularly, when the building owner Plaintiffs had alleged in their Complaint that the Supreme Court of the State involved had ruled over 25 years before in principle, that the City's power to destroy a building found to be in a nuisance condition, was limited by necessity? And secondly, if a District Judge denies without a hearing, or any meeting with the parties' attorneys who were available, to the Court, is such a motion for a Temporary Restraining Order, where the Plaintiffs Building Owners alleges the Mayor and others in the City

are political opponents out to stifle Plaintiffs in their political opposition to the Mayor and City Council, is such reversible error, which further calls for a ruling by this Court to all District Courts in such situations not to deny a motion for a Temporary Restraining Order, nor to dismiss with prejudice such actions without a Hearing, or an opportunity for the Judge who's going to decide the case to give Opposing Counsel a chance to state their case to the Court and Counsel?

2. In such an Action when the Plaintiffs file, with leave, an Amended Complaint which sets up additional factual and legal grounds of denial of Fourteenth Amendment violations by Defendants for Selective Enforcement by the City of various Ordinances and other laws, and also alleges a First Amendement Violation by reason of the City acting in retaliating by changing their position as stated in the Question Presented for Review by their Mayor and City Law Director of previously being willing for Plaintiffs to have some 50 days to come up with a "Plan" to bring their building into compliance with the State and City Codes, this change having been caused because the City Decision Makers became mad when Plaintiffs sued the City Decision Makers in Federal Court in the instant action, and the City then caused the demolition

of the owners building, does the claim by the City that such change was constitutional, because the City's previously expressed willingness for Plaintiffs to come up with a "Plan" to save their building, was just a settlement offer, which the Plaintiffs did not accept, and thereby the City is not liable nor responsible for their acts in retaliation resulting in the destruction of their building, because Plaintiffs sued them in Federal Court?

3. In the situation described above, where in the State Court Action, the State Judge had on March 18, 1993, so found such a nuisance condition to exist, and further ordered the building owners to come up with a contract for the repair of their building in 60 days, and if that were not done, then the City shall appoint a Receiver to take charge of the building, and to seize the personal property on the building property, and to sell the same, "and to apply the proceeds to the repair or demolition of the building..", and the City waits in appointing a Receiver, until after the building owners had appealed to the State Supreme Court, who ended the Appeal by refusing to take Jurisdiction on June 8, 1994, and then the City secures the Appointment of a Receiver on June 20, 1994, and a City newspaper announces on June 20, 1994,

that the Mayor stated that the Building Owners will be given 90 days to come up with such a "Plan" to bring this building into compliances, does such an order in the light of the above events, constitute a mandate to the City that it has no discretion to allow the Owners a reasonable time to come up with such a "Plan", when the law of the State constitutionally requires, as does the law in other states, that the Building Owners be given a reasonable time to repair the building, as demolition of a building found to have some nuisance conditions may be constitutionally resorted to by the City only as a drastic resort and as a last resort, and the Owner must be given a reasonable time to repair?

4. Does the proper and plain interpretation of the holding by this Court in Mr. Holly/City School District Board of

Education vs. Doyle,429 US 274 (1977) clearly require the District Court in this action and the Court of Appeals in this action to hold that Plaintiffs in this Action had successfully pleaded a cause of action for the admitted First Amendment violation by the City Respondents?

5. Does the admission in open State Court before Judge Schmenk, as admitted on the Record by the City Attorney, as pleaded in the Amended Complaint, and as admitted in the City's Briefs in the Court of Appeals, and as the Record in court shows as quoted on at page 19 of this Petition, constitute a legal admission by the City's Attorney, under the law generally, or under Rule of Evidence, 801 (d) Statements Which are not Hearsay (2), Admission by a Party-Opponent, under Williams v. Carbide

Corporation 790 F.2d 552 (6th Cir. 1986)? And Secondly, has this Court ever made a ruling on this point?

6. Are there such clear, decisive, substantial errors of Law in this action in the District Court or in the Cour of Appeals, that the members of the Courts of Appeal should have voted to hear the case En Banc, and is there a need, in order that the highest and most judicious traditions of this Honorable Court may be carried out effectively and realistically for the Cour of Appeals Judges to be admonished by this Court that there is nothing higher nor more laudable for a Court of Appeals Judge to do than to rectify an error by their Brother or Sister Judges?

7. Does what has happened in this case, which an objective observer could describe "as a Comedy of Errors", give

this Honorable Court an opportunity to remind all Federal Judges, and thereby all Judges nationally, that the use of conclusory statements, not supported by citation to precedents, in "Chapter and Verse" reference to fact and law, is an anathema to Justice, the antithesis of what the Judiciary should be, if the public's confidence and respect for our Constitution and the Court's is to be properly maintained?

7. Does the District Court's conversion in this action of a Rule 12 (b) motion to a Rule 56 motion, without notice to the parties, give an example of how too often some circuits do so convert, and thereby Due Process Notice to the Attorneys and the Parties, give an opportunity to this Court to clarify and stop the "chipping away" and in truth, the nullification of the Rule 12 (b) notice,

when as some Circuits now do, a 10 day notice at the least would prevent some injustice, as Partitioners claim occurred in the District Court, with the attending repetition of rejection, disdain from repeated defeats to the Petitioners, and yes, their Counsel, and thus, the uncalled for negative effects from such destructive short cuts?

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FOOTNOTE LIST OF ALL PARTIES.

Otis W. Plassman,

Joyce A. Plassman,

Petitioners,

-vs-

City of Wauseon,

Perry Rupp, Individually and as Receiver,

Tom Hall, Zoning Inspector,

James Gamber, Fire Chief,

Jerry G. Matheny, Mayor,

Clair W. Clark, President of Council,

Respondents.

CERTIFICATE OF SERVICE

John G. Rust, Counsel for Petitioner hereby certifies that he, on September 26, 1996, served three(3) copies of the Petition For A Writ of Certiorari, and the Appendix, on City Attorney Jeffrey L. Robinson, 124 N. Fulton St., P.O. Box 531, Wauseon, OH 43567, (419) 337-5065, Attorney for all Respondents Except Perry Rupp, Receiver; and to Alan J. Lehenbauer, P.O. Box 237, Swanton, OH 43558, (419) 826-0055, Attorney for Respondent Perry Rupp, Individually and as Court Appointed Receiver, by U.S. Mail, First Class, Postage Prepaid.

Respectfully submitted,

John G. Rust

John G. Rust, Attorney
For Petitioners

PETITION FOR WRIT OF CERTIORARI

Petitioners Otis W. Plassman and Joyce A. Plassman do hereby petition the Honorable Supreme Court of the United States to issue in this case a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

CITATION OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINION AND ORDERS ENTERED IN THIS CASE BY THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS.

No opinions by either the Court of Appeals, nor the District Court, have been published. On April 13, 1995, the District Court entered its Judgment Entry, dismissing the case, granting Summary Judgment, denying the Motions for Sanctions, and denying Plaintiffs Plassmans' Motions for Preliminary and Permanent Injunctions and Temporary Restraining Order; and on the same date the District Court entered its Memorandum Opinion, by which without notice under Rule 12B, converted

Defendants Motions To Dismiss the Amended Complaint, to a Rule 56 Motion For Summary Judgment on matters outside the Pleadings. App. p. 31 . Plaintiffs Plassman timely served on Defendants , April 27, 1995 under Rule 6, and timely filed on April 28, 1995, their Rule 59(e) Motion to Vacate the April 13, 1995 Judgment, and for a reasonable time for Discovery, but the District Court denied that Motion on May 30, 1995, and Plaintiffs timely filed their Notice of Appeal to the Sixth Circuit Court of Appeals on June 29, 1995. The District Court on August 1, 1994 had summarily denied our Motion For A Hearing and Temporary Restraining Order, to restrain Defendants from demolishing Plaintiffs' Building. The District Judges each acted without a Hearing or any meeting with Counsel.

The Sixth Circuit Court of Appeals on May 14, 1996 entered an Order dismissing Plaintiffs Plassmans' Appeal, and Petitioners

Plassman then on May 28, 1996 timely filed and served their Petition For ReHearing under Rule 40 and Suggestion For En Banc ReHearing under Rule 35, but the Court of Appeals denied our Petition For ReHearing on June 28, 1996, and we have timely filed our Petition For a Writ of Certiorari on September 26, 1996 to this Court.

STATEMENT OF JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit, judgment herein sought to be reviewed was rendered on May 14, 1996, and on June 28, 1996 the Panel who heard and rendered the judgment herein sought to be reviewed, denied appellant's "Petition For ReHearing Under Rule 40, and Suggestion For En Banc ReHearing Under Rule 35", timely filed on May 29, 1996. See Page App. 47 of the Appendix filed in this Court. The said Petition For ReHearing was a Petition for ReHearing under Federal Rules of Appellate Procedure 40, and complied therewith.

In 28 USCS Section 1254, the text reads:

"§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

CONSTITUTIONAL AND STATUTORY PROVISIONS

"AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant Federal Statute is, as in the USCS series, 42 USCS Section 1983, which there reads:

"§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284.)"

STATEMENT OF THE CASE

This action was filed on July 29, 1994 to try to prevent the City of Wauseon, Ohio from shortly destroying the Plaintiffs' so-

called Kolb Feed Mill Building, which Mr. Plassman with his wife, had land contracted in April 1992, as the centerpiece of his family's financial security, and which he used in a recycling business. The City of Wauseon on November 18, 1992 brought a Nuisance Action, Fulton County Common Pleas #92CV000270, claiming the Kolb Feed Mill Building, was in violation of the State and City Codes, as the Building was zoned Commercial, and Mr. Plassman was using it for an "Industrial" use, together with some building defects not serious structurally, which could be taken care of in 2 weeks time by Mr. Plassman. The 100 year old Building, was well and sturdily built, safe, consisted of 3 sections, and in the middle section, a Lean To had collapsed, and some walls needed shoring, which Mr. Plassman testified that he could take care of in 2 weeks at a later Hearing on the Defendant Plassman's Motion To Stay Demolition. The Kolb Feed Mill Building never had any accidents nor failures,

and was never inspected until the Plassmans' secured it.

To state the background leading to this Federal Action, Mr. Plassman secured an Attorney from Bryan, Ohio to draft an Answer, and this Attorney led him to believe up until February 24, 1993, that he would represent him, then declined, and in the 9 days before the Trial date of March 3, 1993, Mr. Plassman was unable to secure an Attorney.

At the Trial, the Court denied a Continuance for Mr. Plassman to get an Attorney, but there was no real evidence of any fire or other danger, but the Court found the building to be a Nuisance under the Ohio Statute Ohio Revised Code 3767.41 in violating the State and City Codes, by the Judgment Entry filed March 18, 1993, App. P. 49.

By Attorney James E. Hitchcock, Defiance, Ohio, the Plassman's appealed, to the Fulton County Court of Appeals, who affirmed on February 25, 1994, and on June 8, the Ohio Supreme Court refused to take Jurisdiction

by denying Defendants-Plassman's Motion To Certify the Record.

During the Appeals, there had been a "De Facto" Stay. As stated in our Complaint and Amended Complaint at page 8, these, when the Ohio Supreme Court's above ruling was announced in the Wauseon "Expositor Extra" paper, on June 20, 1994, Mayor Matheny was quoted:

> " Wauseon Mayor Jerry Matheny said the next step will be to send a notice to Plassman to have a plan submitted to the city by July 1 detailing what Plassman will do to meet the city and the state's building codes and the city's zoning codes.
>
> We'll want a plan of what he plans to do and we'll probably want him to have it all done within 90 days. If he doesn't, the city could demolish the Commerical Street location because it is a public nuisance and charge it to his taxes," said Matheny. "We'll want him to clean up the Third Street property immediately. This has been dragging on for too long."

Respondent Perry Rupp was appointed Receiver on June 20, 1994, and the Kolb Feed Mill Building was locked, and entrance denied to Mr. Plassman. Also, the Receiver seized numerous vehicles, pieces of equip-

ment, machinery, and other valueable items, and by July 22, 1996 threatened very shortly to demolish the Building.

Attorney Hitchcock not wanting to take on a Federal Case, Mr. Plassman in time went to Hyatt Legal Services, who recommended this Counsel on or about July 22, 1994. This Counsel, in time, reached Receiver Rupp, and was told the Receiver would demolish on or about August 3-5, 1994. Mr. Plassman believed, as was true, that the Receiver, though purportedly independent, was controlled by Wauseon City Law Director Robinson and the Mayor, neither of whom Mr. Plassman trusted. This Counsel then felt realistically the only secure way to save the Building, was to secure a Federal injunction, contacted City Attorney Robinson for dates for the expected Hearing on our Federal Motion For Temporary Restraining Order, and advised Mr. Plassman wanted to, and could, repair and save the Building, and that we would comply and cooperate, with the State and City. This Counsel then researched

and prepared a 20 page Complaint, Case No. 94 CV 7407, which was filed on July 29, 1994 in mid-afternoon. Two hours before, this Counsel received City Attorney Robinson's letter of July 27, 1994, App P. 49, which in part reads:

> " The City would be more than happy to allow the building to remain standing provided that Mr. Plassman comply with the directives of the State of Ohio, Department of Industrial Relations. That is to say that Mr. Plassman needs to provide us with plans for the rehabilitation of the building from a certified architect or engineer and proof that a contract has been entered into with a builder with a specified time date indicating that the building will be rehabilitated within a specified time frame.
>
> This is all we have asked from Mr. Plassman from the beginning."

This Counsel felt assured that this letter narrowed the issues, and so stated in his Aff. of Plaintiff's Attorney John G. Rust In Support of Motion For A Temporary Restraining Order, filed July 29, 1994; App. P. 59. Plaintiffs' Complaint and Supporting Affidavits fully evidenced and demonstrated valid grounds to save the Kolb Feed Mill Building,

and to maintain the Status Quo, the age old purpose of a Temporary Restraining Order. Mr. Plassman in his Affidavit swore to the factual allegations in the Complaint relating to him, which covered that the Building was safe, the "Lean To" section, which had collapsed and was unsightly, and together with some walls needed shoring, could be fixed and removed in 2 weeks time, the only defects with any public risks, and the Building had been in the same condition for years, with no injuries nor failures, and no inspections by the City or State, until Mr. Plassman, a political opponent and critic of the Mayor and Council, became involved. Further, the Complaint alleged that the Building could and would be repaired, as this Counsel had assured City Attorney Robinson, P. 15, and by clearly established constitutional law, necessity was the limit of the City's power in nuisances, and that demolition is and was a drastic and last remedy, only to be resorted to if the Building owner could not and would not repair

the Building, and that the Ohio Supreme Court in Solly v. City of Toledo, 7 Ohio St.2d 16 (1966) had so ruled, as was allegedly known by Defendants. Further the Complaint pointed out that the charge here was that the Building was in violation of the Codes of Ohio, and Wauseon, and constitutionally where a nuisance can be abated by stopping the forbidden use-here using a Commercial business for running a recycling business, there was no ground to demolish. The Mayor's statement published in the Wauseon "Expositor Extra" on June 20, 1994, quoted at page 8 herein, and City Attorney Robinson's letter of July 27, 1994, quoted at page 10 herein, each showed the Building could be repaired and the Mayor gave 90 days from June 20, 1994 to September 18, 1994, and the City Attorney stated no deadline, but the Federal District Court Judge James C. Carr, without even a telephone conference, or any input from the City or Plaintiff, summarily denied our Temporary Restraining Order on the afternoon of Monday, August 1, 1994,

and word thereof telephoned to Counsel. In his Order denying a Temporary Restraining Order, App. P. 29, Judge Carr held Mr. Plassman waited too long, although Mr. Plassman had believed, as do most Americans, that until your State Supreme Court has turned down his Plea, he still could win. In a nuisance case, an Attorney most assuredly is needed, particularly when you are a political opponent of the Mayor, and are cited for Contempt, and jailed for 30 days, during your Campaign for City Council, in 1993 for having a Trailer on the Kolb Feed Mill Building, which the City said was inproper because it was used in what the City called a "Junk Business". But if the City Mayor and Law Director say you still have time to repair the nuisance, why can't the Federal Judge give you a Hearing, and so rule, because under the well established Law in Ohio and elsewhere, demolition is not constitutional, unless absolutely necessary, as this Counsel alleged at page 17 of the Complaint, and Solly v. City of Toledo,

7 Ohio St.2d 16, 36 O.O.2d 9,11, the second paragraph of the Syllabus states the general rule of necessity, as give in 36 O.O.2d at page 9:

" 4. Nuisance Page §33.
Nuisances O.Jur 2d §50

> In such an instance, when sued by the owner, the One destroying the property may be held liable for damages caused by its destruction unless he alleges and proves and the trier of the facts finds that what he destroyed was a public nuisance and that its destruction was reasonably necessary for abatement of that nuisance."

Also, the Opinion, by then Chief Justice Taft, a widely recognized most able and conservative jurist, quoted with approval the Annotation, "Destruction of Buildings," 14 ALR 2d 73, and that Annotation reads at page 92:

"§13. Conditions remediable by repair or alteration of building.

> If the building is a fire hazard, or in a condition otherwise dangerous to the public, and the condition can be remedied by reasonable alterations or repairs, a court will protect the owner from an order that it be destroyed, at least if the owner is ready and willing to make the necessary changes."

To this Counsel it is unconscionable that neither District Judge Katz in granting Summary Judgment and our Rule 59 Motion, nor District Judge Carr, in denying the Temporary Restraining Order cited these basic principles of Constitutional Law, nor did the Court of Appeals panel, although this Counsel referred to Solly v. City of Toledo, 7 Ohio St.2d 16 (1966) in the Complaint and also cited 55 Amer. Jur.2d, Nuisances, Section 359, P. 949, and 66 C.J.S. Nuisances, Section 130, P. 934, to the District and Court of Appeal, but no Opinion refers to the basic principles that if a condition of nuisance can be repaired, or a forbidden use stopped, the owner must be given opportunity to repair and abate; and the significant restraint shown by other courts in protecting property, and in allowing years to comply. Yes, in some cases. But why weren't such principles even discussed or cited in the Opinion? Judicial integrity? These constitutional nuisance principles are argued later in this Petition at pages 25-27.

Each Court has disregarded the allegations and evidences of constitutional violations of selective enforcement in the Complaint and Amended Complaint, of Mr. Plassman because he opposed and criticized Mayor Matheny and City Council in 1993, and before. In paragraph 16 of the Complaint, Plaintiff allege that while Mr. Plassman was a candidate for City Council, for putting a licensed Trailer on the Kolb Feed Mill Building, for sorting recyclable materials, the City caused Mr. Plassman to be put in jail from October 4, 1993 for 30 days, to November 3, 1993, until the election campaign was practically over, but later, when the same thing was done by Mr. Plassman, there was not even a citation. Mr. Plassman thought he was protected by the "Grandfather" principles. The selective enforcement is stated in general in the Complaint at page 11, as follows:

> "Defendants herein are acting in conspiracy and in agreement with each other, and pursuant to the policies and plans and purposes made by the Defendant decision makers, to take any

> and all steps needed to break the Plaintiffs financially, to cause them to go broke, and are further acting out of political opposition and bias, and also are acting by a policy of selective enforcement as, to the Plaintiffs, in enforcing allegedly their codes, whereas as to other similarly positioned residents of Wauseon, the violations for which the Plaintiffs are taken to task, are winked at, or not prosecuted, or knowingly let go, or condoned or accepted, without any protest from the City." (Underscoring Counsel's)

Selective enforcement will be discussed later.

After receiving a telephone call on Monday, August 1, 1994, in the afternoon, of the Denied of a Temporary Restraining Order, this Counsel, direly disappointed and surprised, and particularly after receiving City Attorney's letter stating the City's position, which was basically what Plaintiffs wanted, hastily prepared for a previously scheduled Hearing in the State case on Wednesday, August 3, 1994. This Counsel called Mr. Elmer Waltz, head of the Ohio Building Inspector's office, and was advised, that if Mr. Plassman repaired the Building so that it was "safe", that that was all that the Ohio Code required, and that Mr. Plassman didn't

have to comply with all new standards, and in fact at the March 3, 1993 Nuisance Trial, Mr. Waltz had so testified. Transcript of March 3, 1993 Trial, page 22 and page 30, filed in this case by the City.

In Wauseon, before 9 A.M., this Counsel filed a Motion To Stay Demolition. Judge Joseph Schmenk, from Defiance, in chambers first read Judge Carr's denial of the Temporary Restraining Order, and when City Attorney announced that City Council and the Mayor were no longer willing to give Mr. Plassman time to repair the Building, this Counsel, in turn, asked why was the change of position? City Attorney Robinson said last Monday at Council Meeting, the Mayor and Council were mad and changed their position, because Mr. Plassman sued them for over a million dollars, in this action in Federal Court. This Counsel had supplied on Saturday, July 30, 1994 City Attorney Robinson with a copy of the Complaint so he could be ready for the expected Temporary Restraining Order Hearing. On Wednesday,

August 3, 1994, then, when Plassman's Motion For A Stay of Demolition for the Kolb Feed Mill Building was argued, this Counsel asked the matter be put of Record, and it was as follows at page 120:

" THE COURT: Mr. Rust?
MR. RUST: Thank you, Judge. First of all, Judge, you notice when I filed the Motion that I attached to it a copy of a letter to me from Attorney Robinson dated July 27th, 1994. What is the difference in real substance between what we're asking and what was offered by that letter? What is the real difference between that? We're ready to comply with that letter. There's been some kind of a change. We've talked about it in open--in your chambers with Attorney Hitchcock present, you present, Attorney Robinson present.
MR. ROBINSON: Are we now going to discuss offers and compromises?
MR. RUST: Now listen, now I'm not talking about an offer and a compromise. I'm talking about a fact that was discussed at that time. If you look at the Rules of Evidence and so forth, you can introduce evidences of facts. But besides, do the flags up there stand for the truth? Let's put the truth right on the table. Let's put the truth right on the table.
THE COURT: My understanding from you gentlemen's discussions in my presence in chambers was that the letter by Mr. Robinson was, in fact, the City's position, but the City's position was effected by your guy suing for a million bucks in Federal Court.

MR. ROBINSON: Yes.

MR. RUST: That's right.

THE COURT: And tht was apparently a voluntary--I don't care. If you folks can arrive at some kind of situation where the receiver or the City are willing to agree to forestall demolition, that's fine. But in real life, real fact, it's my understanding that as a pre-condtion to such an agreement, the City/Receiver wanted you to effect dismissal of Federal Court suit.

MR. RUST: That's correct.

THE COURT: And you refused to do that and--

MR. RUST: That's correct.

THE COURT: --so they refused to consent to a stay of the demolition.

MR. ROBINSON: That is absolutely correct, Your Honor.

MR. RUST: Okay. What I'm saying to you is this, Judge: I appreciate your candor, your directness, your honesty; I respect that. What I'm saying to you is, you have enunciated the very fact of why we're being denied this opportunity. Why? Because he ia an American, sue them up in the Federal Court. Are you going to say if you don't sue somebody and try to ask for your constitutional rights, you can have relief; but if you do sue somebody, you can't have relief? That, to my way of thinking, sir, is contrary to the flag. It's contrary to both flags there. And that is wrong." (Underscoring Counsel's)

The underline statement by Judge Schmenk was quoted in the Amended Complaint, p. 18.

Judge Schmenk did not consider the First Comendment issue, although this Counsel agrued

it, but ruled on August 20, 1994 Mr. Plassman had waited too long. An Appeal then was taken timely to the Fulton County Court of Appeals, who Sua Sponte on October 17, 1994 dismissed the Appeal because they held denial of a Motion For Stay of Demolition was not a Final Order. Judge Katz, nevertheless, ruled for the City on Res Judicata holding erroneously that the State March 18, 1993 Judgment Entry in effect covered the issue of abatement of the Nuisance, but Judge Katz did not discuss this specifically; and denied the First Amendment retaliation claim because the City made an offer, which the Plassman's rejected. Judge Katz did not discuss Plaintiff's Selective Enforcement allegations.

On Appeal, likewise, the Court of Appeals, just as the District Court did not, not discuss Solly v. City of Toledo, Supra, nor 55 Amer. Jur. 2d., Nuisance, Section 359, nor 66 CJS Nuisances, Section 1330, nor the many other cases on the owner's right to repair and save the Building. Why? But held that was not an

issue.

The Court of Appeals on the First Amendment issue, ruled, deciding the case on Motions to Dismiss, in their Opinion, App. P. 1 at page 12:

> " Plaintiffs also argue that the district court erred in dismissing their claim that the City defendants violated their First Amendment rights by revoking their offer to allow plaintiffs an opportunity to repair the building on their property and instead seeking its destruction in retaliation after plaintiffs filed this action against the City defendants. It is well established that retaliation by a public official for the exercise of a constitutional right is actionable under 42 U.S.C. §1983, even if the act, when taken for different reasons, would have been proper. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84 (1977); Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953, 959 (6th Cir. 1986); Smith v. Maschner, 899 F.2d 940, 948 (10th Cir. 1990). One of the purposes of this rule is to prevent state officials from exercising their discretionary authority for retaliatory purposes.
>
> In this case, the state court authorized the City to demolish the building on plaintiffs' property before plaintiffs filed their lawsuit against the City defendants. Thus, the City defendants did not exercise discretion in determining that the destruction of the building was an appropriate remedy to abate the nuisance. Therefore, their taking steps to enforce the court's judgment is not the type of retaliatory conduct that the rule

> stated above is intended to protect against. Accordingly, we hold that the district court did not err in finding that plaintiffs failed to state a claim upon which relief could be granted as to this issue."

After the Court of Appeals Judge refused ReHearing, and En Banc ReHearing, the State Court upheld the Receiver's Account, refused a Hearing on the same where we had witnesses and proffered to prove that the Receiver, a fiduciary who should handle another American's property as his or her own, had sold the recyclable materials for 5¢ on the Dollar, causing losses over $20,000; and an Appeal was taken, and on June 28, 1996 the Fulton County Court of Appeals ruled that their prior Judgment of October 17, 1994 was wrong, was on reconsideration deemed vacated, but held the First Amendment issue was not argued in the Trial Court, and would not be considered since it was raised first in the Fulton County Court of Appeals. We moved, 4 days late under Ohio Appellate Rule 26 for Reconsideration, and that Court refused to consider it Sua Sponte and denied our Application For

Reconsideration. Appeals have been timely filed to the Ohio Supreme Court.

Petitioners Plassman respectfully move this Court to withhold ruling until the Ohio Supreme Court Acts, as we will Appeal that ruling, if adverse.

ARGUMENT

I. THE SUPRME COURT OF THE UNITED STATE SHOULD SEND A CLEAR AND FORCEFUL MANDATE THAT THE PRIVILEGES AND OBLIGATIONS REQUIRED BY THE CONSTITUTION OF THE UNITED STATES ARE TO BE FULLY AND EFFECTIVELY CARRIED OUT BY ALL AMERICAN COURTS, WHO SHOULD ZEALOUSLY AND EFFECTIVELY CARRY THEM OUT. FURTHER THAT EVERY AMERIAN, REGARDLESS OF WHATEVER DISCRETION TO ACT OR NOT TO ACT, SHALL NOT TAKE ANY ACT IN RETALIATION BECAUSE OF THE EXERCISE OF ANY CONSTITUTIONAL RIGHT, WHICH WOULD NOT HAVE BEEN TAKEN, IF THE CONSTITUTIONAL RIGHT HAD NOT BEEN EXERCISED. SO HERE, THE COURTS BELOW SHOULD RECOGNIZE AND HOLD THAT THE RESPONDENTS ACTS IN RETALIATION FOR PETITIONERS' EXERCISE OF A FIRST AMENDMENT RIGHT, IS AND WAS, ACTIONABLE, AND ANY RESPONDENTS SO PROVEN CHARGEABLE, MUST ANSWER IN DAMAGES, AND THE LAW SO DECLARED IN DECLARATORY JUDGMENT, AS PRAYED IN THE AMENDED COMPALINT HEREIN.

Both the District Judge and the Court of Appeals Judges, all roughly 25 of them, for

sook their duty--took steps to lessen, here to denude and absolutely to deny, basic, most important First Amendment rights. When a Judge makes crucial holdings without citing any precedent, as the Court of Appeals, and District Judge did, the Supreme Court should castigate, hold up to disdain and disrespect, and make clear the high duties of every Judge to exercise the Judge's powers with respect for the highest American Traditions.

Every Conclusory statement is an anathema, a curse, and Judges should, and must, avoid them. How do you distinguish between an act without precedent, and an act of prejudice?

So, here, this Counsel claims there was a Constitutional duty under "Both Flags" for the Plassman's to be given a reasonable time to repair. We cite multiple cases in the Court of Appeals, and District Court and State Courts. Judge Schmenk knew the City had the right to allow Repair. In the Brief in the Court of Appeals at page 26, this Counsel

stated:

" Next we attach from Plaintiffs' Reply Memorandum in Support of Their Rule 59(e) Motion, R. 50, pages 5, 6, and 7:

First we quote the texts. In 55 Amer. Jur. 2d, Nuisances, Section 359, at page 949, reads in the part here material:

"However, destruction of property found to constitute a nuisance is a drastic remedy, and it must necessarily be a remedy of last resort unless the property is of such nature that its use or possession cannot be other than for evil; where less drastic means are available to correct or alleviate the problem, the destruction of private property deemed a nuisance is an arbitrary act that is prohibited as a matter of law.31"

In 66 C.J.S., Nuisances, the text at page 934 reads:

"§130. --Destruction and Forfeiture of Property

In exercising their power to abate nuisances, the courts do not order the destruction of property if it is practicable otherwise to remove the nuisance.7 Where the nuisance consist in the use of a structure which is lawful and not of itself a nuisance, the relief should be by enjoining such use,8 and not by the destruction of the structure.9 However, property may be ordered destroyed if this is necessary to remove the nuisance,10 at least in extreme cases,11 as where the condition of the thing is such that it is offensive to the morals of the community and is incapable of being put to any lawful use by the owner.12" (Emphasis Ours.)"

See: Jackson v. Columbus, 41 O. App.2d 90, 70 O.O. 2d 92, 95 (1974); Minot v. Freelander, 368 N.W.2d 514 (North Dakota) and also 380 N.W.2d 321, 324 (delays over 3 years; attorneys stipulated to stay during Appeal) Orion Charter Township v. Burnac, 431 N.W.2d 225 (Mich. App. 1988) (Delay of 5 years before Demolition).

Today al the higher, more respected, persons say one should judge others by their actions, not their words. How can any Federal District Judge deny a Motion For a Restraining Order to save a Building, or dismiss an Action for Multiple Allegations of Selective Enforcement and Denial of First Amendment rights, without a Hearing? Such is Judicial Arrogance calling for this Honorable Supreme Court, yes the Supreme guardian of Americans' rights, and, yes, thereby, of the World, to "Speak out loud and clear", that Judges who deny rights without a Hearing are to be "Tarred and Feathered". And so they should be.

Every City in America has buildings

properly facing charges of being a nuisance. Here, we have a group--in political power, yes out, and carrying out, their purposes of ridicule, breaking a man and family financially the most certain way to stamp out an opponent-and who is going to fight that? Yes, this Court is needed, and direly needed. Yes, America needs a moral crusade--to the highest principles of America--and Justice does have to be fought for.

This Honorable Court has the brains, the courage, and the commitment, to take this case, and send out a mandate to the Judges and all in govermental power, that those in power do have a Public Trust, and it must be exercised with respect for our Constitution. We need your help.

ARGUMENT NO. II

THIS COURT SHOULD ORDER ALL FEDERAL JUDGES, AND ADMONISH THEREBY ALL STATE JUDGES, TO HOLD HEARINGS BEFORE ANY BUILDING IS DESTROYED, AND ABOVE ALL, BEFORE ANY CLEAR CONSTITUTIONAL RIGHT IS DENIED BY ANY CITY OR OFFICE AGAINST A POLITICAL OPPONENT.

This has been argued herein before every

Federal Judge has vast powers. Justice is furthered when both sides are allowed to speak however briefly. No court is so short of Judges that a telephone conference can't be held.

ARGUMENT III

ALL GOVERNMENTAL OFFICIAL AND PERSONS SHOULD ZEALOUSLY TRY TO AVOID SELECTIVE ENFORCEMENT OF THE LAW AND GOVERNMENTAL POLICY. THE APPEARANCE OF STRICT EQUAL TREATMENT UNDER THE LAW MUST BE CONSIDERED. FAILURE SO TO DO IS AN ACTIONABLE DENIAL OF CONSTITUTIONAL RIGHTS.

As in supported by the Record, Petitioners alleged all City Defendants and the Receiver were trying together to discourage Mr. Plassman from running for Council, and criticizing Mayor Matheny and City Council, and to bring him to his knees financially, and beginning at page 18, in the Amended Complaint Plaintiffs alleged that the City enforced Ordinances against Plaintiffs but not against others who did the same thing. Gagliardi v. Villiage of Pawling, 18 F.3d 188, (2nd Cir. 1994).

ARGUMENT IV

THE COURT OF APPEALS FAILED TO REQUIRE THE RECEIVER TO COMPLY

WITH OHIO REVISED CODE 3767.06 AND .41, WHICH REQUIRES A RECEIVER TO SEIZE ONLY SUCH EQUIPMENT OR PROPERTY AS IS USED IN THE COMMISSION OF A NUISANCE; (G) IMPOSES LIABILITY FOR ".. MISFEASANCE, MALFEASANCE, OR NON-FEASANCE..."; AND FOR BREACHES OF DUTY AS A FIDUCIARY.

Receiver Rupp was asked to sort and classify, necessary to get the fair value from recyclable material, but refused, and squandered Mr. Plassman's property; refused to sell at Public Auction as required, and to make an Inventory. This Counsel is pressed for space and there's more in the Record.

CONCLUSION

Neither Court nor their staff followed, but "stripped" Mt. Holly/City School District Board of Education vs. Doyle, 429 U.S. 274 (1977). The Courts of Appeal need a mandate to be more important, to not act like an exclusive "Club" like the Senate, and to be told that no act is more judicious nor honorable than to rectify an error by their brothers and sisters. Right now, unfortunately, such is not their view, as judged by their acts.

Respectfully submitted,

John G. Rust

John G. Rust, Attorney
For Petitioner

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

OTIS W. PLASSMAN,
JOYCE A. PLASSMAN,

Petitioner,

vs.

CITY OF WAUSEON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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